In The

Supreme Court of the United States

October Term 1950

No.....

ROBERT STROUD,

Petitioner.

vs.

E. B. SWOPE, Warden, United States Penetentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief in Support of Petition for Writ of Certiorari

SUMMARY OF CASE

This is an injunction proceeding in which the petitioner, an inmate of the United States Penitentiary at Alcatraz, California, attempts to restrain the Warden of that institution from unlawfully interfering with his correspondence for the express and admitted purpose of damaging him in his property rights (R-1-13).

The petition alleges that the actions complained of are the result of a continuing conspiracy that has existed since 1931, and that petitioner has suffered grevious financial loss as a result of said conspiracy, the purpose of which is and has been to so damage him in his property right as to make it impossible for him ever to obtain funds which might be used to carry on a campaign for his release.

Attached to the petition and made a part thereof by reference is a memo that the petitioner sought to have delivered to his business agent, and which shows plainly the type of matters which the Warden has unlawfully attempted to prevent by interfering with his correspondence.

The advantageous sale of a copyright on a book, *Stroud's Digest On the Disease of Birds* of which the petitioner is the author and was at the time of the filing of his petition, the copyright owner.

The selling of a story of the petitioner's life, written from documents and records not within the custody or jurisdiction of said Warden;

The prevention of a friend and wellwisher from deeding to the petitioner a piece of real property of considerable value;

The frustration of lawful plans for affecting petitioner's release by executive clemency (Exhibit B, R 22-29).

The petition alleges that the petitioner has a substantial property right in each of the matters mentioned, and that the pretext upon which the Warden has refused to permit the correspondence in question is an unconstitutional order of the Federal Bureau of Prisons, first promulgated upon October 4, 1931, which is set out in full in revised

for in the opinion of the Court below (Note (1) R. 60) and that said order is unconstitutional because it is not and never was intended to be applied equally to all inmates (R.15) because it is a usurpation of power never granted or intended to be granted by the Congress and because it seeks to vest in the Federal Bureau of Prisons with absolute and arbitrary power over the property of all persons convicted of crimes against the United States (R.16).

Attached to the petition filed in the District Court is a motion for the personal appearance of the petitioner for the purposes of prosecuting the action in propria persona (R.18-21) which sets out reasons why the motion should be granted.

ARGUMENT

The Petition respectfully submits:

I

THAT AS A CITIZEN OF THE UNITED STATES EVEN THOUGH INCARCERATED IN A PENITENTIARY RETAINS PROPERTY RIGHTS THAT HIS KEEPERS ARE LEGALLY BOUND TO RESPECT.

The Fifth Amendment to our Constitution provides that:

> "No person shall be—deprived of life, liberty, or property without due process of law."

Section 41 of the Title 8, U.S.C. provides that:

> "All persons within the jurisdiction of the United States shall have—equal benefit of all laws and proceedings for the security of persons and property . . . "

Section 42 of the Title 8 provides that:

> "All citizens of the United States shall have the same right—to inherit, purchase, lease, hold and convey real and personal property."

Section 43 of Title 8 provides that:

> "Every person who, under the color of any statute—subjects any citizen of the United States—to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

The disabilities of convicts depend on statutory provisions.

(18 C.J.S. 105; *Byers* v. *Banks,* 139 Pac. 948; *Haynes* v. *Paterson,* 125 Va. 730, 102 S.E. 471, 6 A.L.R. 1456)

There is no Federal statute affecting civil or property rights of convicts.

(*Presburg* v. *Hull,* 34 Mo. 29)

The prisoner retains all the rights of the ordinary citizen excepting those expressly taken from him by law or necessary implication.

Coffin v. *Reichard,* 143 F (2) 443

In the court below the respondent relied upon *Kelly* v. *Dowd,* 140 F 2d 81 (C.C.A. 7th, 1944).

This is a case brought in the Federal District Court by a State prisoner. The opinion hinges on the fact that the prisoner had not exhausted his remedies in the State Courts. The Court said:

" . . . whether a State Warden . . . has adopted regulations or performed acts which result in unreasonable discrimination against an inmate or takes from him the right not to be subjected to indignities or deprives him of what prisoners are permitted to enjoy under the statutes, are questions peculiarly fit to be determined in the first instance by the Courts of the State."

But if State Courts have the power to control the wrongful acts of State Wardens, it is obvious that Federal Courts have the same power over federal Wardens.

Dissenting opinion of William Denman in *Sanders* v. *Johnston* 159 F (2d) 74

The respondent also relies upon *Platek* v. *Aderhold* (C. C.A. 5) 73 F (2d) 173, 175.

In this case the Court said:

"The equitable remedy of injunction is not available touching good time, for equity does not meddle with matters of criminal law unless property rights are to be protected."

II

That his right to own property is protected from official encroachment and conspiracy by sections 43 and 47 of Title 8, and that the function of court is the safeguarding the property rights of all citizens from official encroachment.

As a matter of common sense, the possession of a right presupposes the power to protect it, and civilization exists only where the courts have been established as a substitute for trial by battleaxe. In the primitive society the indi-

vidual possesses no right that he is not willing to fight for and able to defend. Of course, that is true, in a large sense in all societies, but the degree of civilization can always be measured by extent to which the rights of individuals are protected by the Courts.

The Constitution, by Andrews

It is elementary that the power of judicial review of the acts of either the legislative or executive branches of the government exists. Such power has not been seriously questioned since the celebrated case of *Marbury* v. *Madison* 1 Cranch 137 (1803)

The exercise of the discretion of prison officials who are subordinate officers and the Executive Branch of the Government, is no exception to the rule. The Courts have interfered to prevent the use of cruel and inhuman punishment in violation of the United States Constitution.

In re Birdsong, 39 F. 599 (1899)

In that case the Court held that a prison keeper, for the purpose of keeping custody of prisoners committed by a United States Court, is an *officer* of *such court.*

In *Kelly* v. *Dowd,* supra, it is held that State Courts of necessity have the power to control the wrongful acts of State Wardens.

This Court has held that an administrative agency may not finally decide the limits of its statutory power. That is a judicial function.

Social Security Board v. *Hierotke,* 327 U.S. 358, 369 (1946)

Fleming v. *Moberly Milk Products Co.* 160 F (2d) 259, 265, (App. D.C. 1947) Pet. Writ. Cert. dismissed on motion of counsel for petitioner, 331 U.S. 786.

The petition is applicable to administrative officers.
Cf. *International Ry. Co.* v. *Davidson,* 257 U.S. 506, 514, (1921)

"Otherwise, the individual is left to the absolutely uncontrolled and arbitrary actions of a public and administrative officer whose action is unauthorized by any law, and is in violation of the rights of the individual".
American School of Magnetic Healing v. *McAnnulty* 187 U.S. 94, 110 (1902)
Fleming v. *Moberly Milk Products Co.,* Supra

It is the undoubted rule that discretion of an administrative functionary may never be arbitrarily exercised and when it is, the manner of its exercise may be judicially reviewed.

Bradley v. *Richmond,* 227 U.S. 477, 483 (1912)
Marshal v. *Bowles,* 58 F Supp 463 (N.D.Cal. 1944)
Acret v. *Harwood,* 41 F Supp 492 (S.D. Cal 1941)
Hine v. Welch, 23 F (2d) 259

In view of these principles, it is apparent that the court below wrongfully held that the respondent herein possessed an absolute right to carry out the duties imposed upon him by statute in such an arbitrary and uncontrolled manner as to effectively deprive the petitioner of his property, or in any manner he sees fit.

This court in the case of *St Joseph Stock Yard Co.* v. U. S. 298 U.S. 38-52 (1935), has said:

"Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Certainly, the silence of Congress in its enactment of the applicable law (Title 18 U.S.C. 4042) as to judicial review of the Warden's administrative acts is not necessarily to be construed as a denial of the power of Federal Courts to grant relief in the exercise of the general jurisdiction which the Congress has conferred upon them.

Estep v. *U.S.* 327 U.S. 144 (1946)

The petitioner has charged that the Warden in the instant case has acted in such a manner as to deliberately and intentionally injure him in his property, has deliberately caused him to suffer heavy financial loss, and that such action is the result of a conspiracy entered into for that specific purpose.

He has not asked the court below to interfere in any manner with the discipline of the institution to which he is lawfully confined but he has challenged the authority of said Warden to constitutionally stretch his disciplinary power to cover matters concerning the handling of petitioner's property beyond the prison walls. As such, the action is properly brought and the court below is mistaken in the view that Congress did or could have intended it otherwise.

See *Philadelphia Co.* v. *Stimson,* 223, U.S. 605, 620 (1911)

The petitioner is seeking by this action a judicial review of the respondents conduct in the light of the complete history of his relationship with the Federal Bureau of Prisons as outlined in Appendix A. He seeks a review of a question of law, to wit: Whether a prisoner in a United States Penitentiary is entitled, as a matter of right under the Constitution of the United States, to exercise control

of his lawfully acquired property, so long as that property, is used in any lawful manner. It has never been doubted that questions of law form the appropriate subject matter for judicial determination.

See *Federal Radio Comm.* v. *Nelson Bros. Co.* 289, U.S. 266 (1932)

The petitioner, in the hope of forestalling threatened injury from the continuation of the respondent's illegal conduct, has instituted these proceedings to enjoin respondent from further unreasonable interference with matters that are entirely outside of his sphere of administrative authority. By no stretch of the imagination can the deeding of real property beyond the walls of the prison be considered a matter of prison discipline, nor can the copyright in a book of which the petitioner is the owner or any property value which may accrue to him and become attached to his name as a result of service to his fellowmen beyond the walls be considered matters within the scope of the Warden's disciplinary discretion, and the jurisdiction of federal courts to issue injunctions to protect property rights or other rights safeguarded by the constitution cannot be disputed.

Bell v. *Hood,* 327 U.S. 678 (1945)
Philadelphia Co. v. *Stimson,* 223 U.S. 605 (1911)
Hays v. *Seattle,* 251 U.S. 233 (1919)
Pennoyer v. *McConnaughy,* 140 U.S. 1 (1890)
City Ry Co. v. *Citizens R.R. Co.* 166 U.S. 557 (1896)
City of Mitchell v. *Dakota Telephone Co.* 246 U.S. 396, 407 (1917)

In case of a threatened injury by the action of an officer of the United States which is beyond the statutory limits of said officer's authority, such officer cannot claim immunity from injunction process.

Philadelphia Co. v. *Stimson* 223 U.S. 605, 620 (1911)

The principle has frequently been applied with respect to State Officers seeking to enforce unconstitutional enactments.

Osborn v. *Bank of United States* 9 Wheat, 838, 843, 868 (U.S. 1824)

And it is equally applicable to an executive officer of the United States acting in excess of his authority.

Philadelphia Co. v. *Stimson,* supra
Nobel v. *Union River Logging R.R. Co.* 147 U.S. 165, 171, 172 (1892)
American School of Magnetic Healing v. *McAnnulty,* supra

On the other hand the court below bases its opinion in part on *Price* v. *Johnston,* 334 U.S. 266, cited by the petitioner for other reasons and points out at page 285 that

> " . . . lawful incarcerations bring about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Which is obviously true. You do not permit a man in prison to purchase dynamite or hacksaws. The Warden is charged with the duty of retaining custody and enforcing good order, and within those limits his power is, or should be, in the absence of a clear showing of abuse of discretion, absolute, but even that does not mean that he can disregard the clear provisions of the constitution and law.

Kelly v. *Dowd,* 140 F (2) 81 (CCA 7th, 1944)

And furnishes no legal justification for the invasion of the right of the individual prison inmate which does not

come within the limits of retaining custody or enforcing good order.

It should be noted that in *Price* v. *Johnston,* supra, this court recognized the justice of Price's contentions and granted him the relief prayed for on every point raised in his petition.

In this connection the opinion of the court below (R.60) cites

DeCloux v. *Johnston,* 70 F Supp 718
Sanders v. *Johnston,* 159 F (2) 74
Numer v. *Miller,* 165 F (2) 936
Sanders v. *Swope,* 176 F (2) 311
Snow v. *Roche,* 143 F (2) 718
Shepard v. *Hunter,* 163 F (2) 872

Yet, in not one of these cases does the record support the inferences drawn from them by the government, and written into the opinion of the Court below in this case.

DeCloux v. *Johnston* 70 F Supp. 718 was dismissed on technical grounds that did not go to the merits of the contentions made. It was not appealed because DeCloux was given what he really wanted by the prison officials.

Sanders v. *Johnston,* 159 F (2) 74. The Opinion in this case was a complete evasion of the contentions of both sides and affirmed the action of the District Court on the grounds of insufficiency of the pleading. On the question of the Court's power to review the actions of the Warden, it said:

> "We need not enquire what if any authority the courts have in the premises. The complaint was properly dismissed for failure to state facts sufficient to entitle appellant to relief."

Judge William Denman in a vigourous dissent said:

> "The reductio ad absurdum of the Warden's contention is that a prisoner may be hung up by the thumbs for a week for an infraction of prison discipline and yet the courts could not enjoin such cruel and unusual punishment forbidden by the Eighth Amendment. This although 8 US CA 43, provides for a civil action in equity for deprivation of constitutional rights. In this appeal we have the question of the deprivation without due process of the Fifth Amendment of appellant's property right in his litigation in which he is refused communication with his attorney".

Judge Denman dissenting *Sanders* v. *Johnston,* supra *Numer* v. *Miller,* 165 F (2) 986. This case was instigated by the petitioner herein. It involved a suit for an injunction to restrain E. J. Miller from arbitrarily denying Numer educational advantages allowed to other inmates, but the real purpose of the suit was to expose an attempt to deliberately murder twenty-five inmates ** of Alcatraz during the Mutiny there on May 2, 1946. It was reasoned by petitioner that the District Court of the Northern District of California, which would not grant a hearing on a question of life and death, might grant a hearing on some phoney- baloney issue like an English lesson that did not amount to anything anyway. And that is exactly how it worked out.

**NOTE: It was planned to murder the twenty-five men in D-Block on the pretext that the prison authorities thought the rifle was in there, while they actually knew better. The petitioner, by challenging this point and putting his own life on the line was able to defeat the murder plot and bring all the men through alive, although more than 30,000 shots and two hundred anti-tank grenades were fired at them. This attempted murder was at the direct order of James V. Bennett, but was not whole-heartedly approved by some of the men sent to carry out the execution."

At the hearing, Numer handed to Judge Michael J. Roche a document entitled Ex Parte Richard A. Numer and Robert Stroud, which contained the inside, eye-witness story of the attempted murder, including a verbatum report of many official conversations not couched in polite language, written by this petitioner. The document was hand printed and ran to twenty-eight thousand words. It was altogether too hot to file or to release to the public, but it was so convincing that Judge Roche kept it in his possession for one month and it set in motion the train of events which led to E. J. Miller and James A. Johnston being removed from Alcatraz as Associate Warden and Warden for 3040 days good time which they had taken from Numer being eventually restored in its entirety.

Sanders v. *Swope,* 176 F (2) 311. In this case the appeal was dismissed for the reason that appellant had used improper language in his brief in which he referred to the F. B. I. as the *American Gestapo.*

Snow v. *Roche,* 143 F (2) 311. Cecil Snow was an illiterate Okie. He had developed gum abcesses as a result of malnutrition and was suffering from the obvious symptoms of scurvy. The dentist talked him into having all of his teeth removed, and during this period the boy lost more than forty pounds. His body became covered with sores. His pleas for a diet that would sustain him during the ordeal of having his teeth removed were ignored. He reasoned that Judge Roche, who had presided at his trial a short time before on a charge of murder of which he had been acquitted, would, if he saw him, be convinced of the justice of his complaint from the change in his appearance. He wrote the petition himself, and it was so

bad it would have been funny if it had not been so pathetic. He entitled his petition *habeas corpus;* he addressed it to Judge Roche; he prayed for his release on the grounds that he was being subjected to cruel and unusual punishment and being deprived of his life without due process of law; but he added that he would gladly settle for two little eggs and a half of bowl of milk.

He sent first draft of his opus to the writer to have it corrected.

The writer unscrambled Cecil's unique language just sufficiently to make his meaning clear without spoiling his individual style.

The petition was assigned to Judge Louis E. Goodman and summarily dismissed.

The petitioner herein had the idea that the case provided a rare opportunity to test the validity of Rule No. 1 of the District Court for the Northern District of California under which ninety percent of the petitions filed from Alcatraz are assigned to Judge Goodman and summarily dismissed, it is firmly believed here, without reading more than the heading. He drew the petition for Mandamus and had it filed in the Ninth Circuit Court.

The Court issued an order to show cause.

The Warden filed a voluminous return; and the court held that since the facts alleged in the petition did not go to the validity of Snow's judgment, they were without power to issue the writ prayed for.

Judge William Denman who sat on this case later said:

"We did not say that Snow had no remedy, for assuredly he had. We merely said that habeas corpus was not the

proper remedy for one attempting to litigate the propriety of his treatment by prison authorities."
Price v. *Johnston* 159 F (2) 234

From Dissent by Judge William Denman See *Price* v. *Johnston* 334 U.S. 266 wherein this court reversed the majority opinion of the Circuit Court and sustained the conclusions drawn in Judge Denman's dissent.

Not one case cited in the opinion of the Circuit Court (R58,61) supports the conclusions drawn by that Court.

It is submitted, therefore, that the courts do have power to review the unlawful invasion of property rights by minions of the Federal Bureau of Prisons and that such rights are protected by the Fifth Amendment and Sections 43 and 47 of Title 8, U.S.C.

III

THAT THE NINTH CIRCUIT COURT WAS MISTAKEN IN ITS PRESUMPTION THAT CONGRESS EXPRESSED AN INTENTION TO DEPRIVE THE COURTS OF POWER TO REVIEW ADMINISTRATIVE ACTS OF MINIONS OF THE FEDERAL BUREAU OF PRISONS BY MERE SILENCE UPON THE QUESTION OF REVIEW IN THE CREATIVE STATUTE AND RESTRICT THE COURTS TO FUNCTION OF DELIVERING FROM CONFINEMENT THOSE WRONGFULLY HELD.

The Court below said (R 60):

"We think that it is well settled that it is not the function of the Courts to superintend the treatment and discipline of prisoners in penetentiaries, but only to deliver from imprisonment those who are illegally confined."

In support of this view the opinion cites:
Sarshik v. *Sanford,* 142 F (2) 676

Platek v. *Aderhold,* 73 F (2) 173
Kelly v. *Dowd,* 140 F (2) 81, 83
Snow v. *Roche,* 143 F (2) 718
Shepard v. *Hunter,* 163 F (2) 872
Taylor v. *United States,* 179 F (2) 640

Most of these cases have been analyzed ante and it is sufficient to point out here that not one of them clearly supports the conclusion drawn by the lower court, and most of them contain expressions that are clearly to the contrary.

On the other hand, this court has supported the contrary rule in every case where a similar question has been presented.

Poindexter v. *Greenhow,* 114 U.S. 270, 282, 288, 290 330.
In Re Ayers 123 U.S. 443, 500
Cunningham v. *Macon & Brunswick, R. R. Co.* 100 U.S. 446, 452
United States v. *Lee,* U.S. 196, 220
Exparte Young, 209 U.S. 123
Hopkins v. *Clemson Agricultural College* 221 U.S. 636, 643
Philadelphia Co. v. *Stimson,* 223 U.S. 605, 619, 620
Exparte LaPrads, 259 U.S. 444, 445

The correct rule has undoubtedly been stated in *United States* v. *Ring Construction Co.,* 96 F. Supp 762, by Nordbye, Chief Judge, for this District of Minnesota, Feb. 23, 1951 wherein Judge Nordbye said:

"Briefly construed, section 403 (8) (1) forbids review by this court of any questions of the tax court. But Congress cannot delegate to an administrative agency the

power to venture beyond the limits set by the Constitution."

Crowell v. *Benson,* 285 U.S. 22

Switchmen's Union of North America v. *National Mediation Board* 320 U. S. 297

This rule applies whether the Administrative ruling involved will apply to a corporation or to an individual.

Estep v. *United States,* 327 U. S. 114

A statute governing the final reviewability of an administrative determination must like any other statute be interpreted so as to be constitutional if possible.

See Estep v. *United States,* supra.

In re Goldman v. *American Dealers Service.*

135 F (2) 398, On page 400, Judge Frank, with the concurrance of Judge August N. Hand, speaking for the court said:

> " . . .For the purpose of construing the statute, we are required to assume that appellants, government officials, without a shadow of lawful authority, have seized a citizen's property. Officials when they thus behave, are stripped of their official characters; what they do is the mere wrong and trespass of those individual persons who falsley speak and act, in the name of the government; an official who has acted in that manner, ceases to an officer of the law, and becomes a private wrong doer; though professing to act as officers."
>
> *Poindexter* v. *Greenhow* 114 U. S. 270, 282, 288, 290, 330."

Judge Learned Hand who dissented for other reasons, said:

> "It is true that a delay of six months may be unnecessary - - in this case it seems to have been used to force the plaintiff to an 'administrative proceeding' for which I can find as little warrant in law as my brothers."

But there is no practical difference between seizing a person's property and cutting the string by which he keeps control of his property and manages it in the manner most advantageous to his interests. In both cases, the loss suffered by the victim of such official usurpation of power is the same. No moral or practical line can be drawn between the man who goes out as an individual and seizes the property of others at the point of a gun and the man who uses his official position to destroy the property of someone subject to his control at the instigation of a superior who hates and desires to injure that party. One hopes to gain material wealth directly; the other hopes to gain personal advantage through the good graces of the superior, but both are injuring others for personal gain.

It is impossible for any statute to escape the fixed rules of construction as to constitutionality, and the Act creating the Federal Bureau of Prisons cannot logically be made an exception.

Estep v. *United States,* Supra

So even had the statute contained a clause specifically exempting the acts of prison authorities from judicial review, the minute those acts came in to conflict with provisions of the Constitution or with other statutes of the United States, it would become the duty of the Courts to construe the statute in such a manner as to save the constitutional safeguards essential to our form of government, and if that were impossible, to declare it unconstitutional.

Therefore, it is submitted, that the Ninth Circuit Court was mistaken in imputing to Congress an intention that Congress could not have entertained without coming into conflict with the constitution, and, since the members of

Congress, no less than the courts, is charged with the duty of upholding the Constitution, it cannot be assumed that it intends to act unconstitutionally.

IV

THAT A SINGLE DISTRICT JUDGE DOES NOT HAVE AUTHORITY TO DISMISS A CIVIL ACTION CHALLENGING THE CONSTITUTIONALITY OF ANY ORDER OF AN EXECUTIVE AGENCY OF THE UNITED STATES.

The applicable statute is section 2282 of Title 28 USC, which reads:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for regugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Section 2284 reads in its pertenent parts:

> "The district judge to whom the application is presented. . . shall immediately notify the Chief Judge of the circuit, who shall designate two judges. . . " Subsection (1).
>
> "If the action involves . . . an order of any department or agency of the United States . . ." Subsection (2), paragraph 2.
>
> ". . . A single Judge shall not . . . dismiss the action." Subsection (5) paragraph 1.

While section 2282 does not specifically mention orders of executive agencies, the words *operation* and *execution*

comprehends the orders of agencies created under acts of Congress, since the powers of such agencies created flow directly from the creative statutes and are limited by the authority therein granted. This construction is obvious from the reading of sections 2282 and 2284 together.

The case law on this point is not available to the petitioner at the moment, but it is undoubtedly well known to the members of this court, and the statute appears to be clear and unambigious.

The obligation to act within the framework of our Constitution bears just as heavily upon the Executive branch of the Government as it does upon the Legislative or the Judicial branches.

Estep v. *United States* 327 U. S. 114
Poindexter v. *Greenhow* 114 U. S. 270,282,288
International RY Co. v. *Davidson* 257 U. S. 506,514, (1921)

The order complained of has been set out in the opinion of the court below (R60, note (1) and in its pertinent parts reads as follows:

> "Correspondence with business associates, of course, must be limited to social matters. *An inmate cannot be permitted to direct his business, no matter how legitimate it may be, while he is in prison.* But this does not go to the point of prohibiting correspondence necessary to enable the inmate to protect and husband the property and funds that were legitmately his at the time he entered the institution. Thus a prisoner could correspond about refinancing a mortgage on his home or sign insurance papers, but he could not operate a mortgage or insurance business while in the institution." F. B. P.

Manual Bulletin 9X096. Feb. 23, 1944.
Paragraph 2, Section 6.

Note the underscored sentences. This sentence is the rule, and all other parts of the paragraph are addenda, as originally promulgated on October 4, 1931, it read:

> "An inmate may not be permitted to transact business by correspondence, no matter how legitamate it may be, correspondence with business associates must be limited to social matters only."

This is the rule that prompted Representative McSwain to inform Sanford Bates that he was acting like the G. P. U. and had better pay more attention to the Constitution of the United States and less to the doctrines of Karl Marx. (Appendix A. Paragraph 19).

This rule is unconstitutional because it is incapable of being impartially and uniformly inforced, and attempts to place matters outside of the statutory jurisdiction of prison officials within their control, through their control of the inmates correspondence. To illustrate:

A man whose wealth consisted of real estate or mortgages might be able to husband it under this rule, but what of the man whose wealth consisted of copyrights on literary works when someone had taken advantage of his imprisonment to infringe on his copyright for personal profit.

This court has repeatedly held that a copyright is property which may be protected by proceeding in equity or suits at law filed in the District Courts of the United States,

> Title 17, U. S. C. A. SEE annotations following sections 1, 34, and 41.

or by criminal actions in the district courts of the United States in cases of wilful infringement.

> Title 17, U. S. C. A. Section 28, SEE annotations following section.

Yet, it has been held by the Federal Bureau of Prisons that this rule has forbidden an inmate to protect a copyright for the reason that such an action might cause publicity adverse to the Bureau.

Note: In 1933 E. J. Powell of Kansas City published, *Diseases of Canaries* by Robert Stroud, under an agreement to pay one dollar to the author or his agent for every copy sold; to print in the front of the book an introduction containing a plea for the author's release from prison, and to print in the back of the book certain advertising material beneficial to the author.

The work was published in April, 1933, but all material beneficial to the author was omitted, not one cent of royalty was ever paid.

This work was copyrighted in the name of the author in compliance with the provisions of sections 9 to 18 of Title 17 U. S. C. A. Later in the year the author served a written demand for his royalties upon the publisher of the work in compliance with Title 17, U. S. C. A. section 1, and when his royalties were not paid, and when he had been prevented by the prison authorities from writing to any attorney concerning his claim, petitioner contrived to have served on the publisher notice of infringement which warned said publisher that he was forbidden to reproduce the work in whole or in part, and that any violation of said prohibition would be prosecuted under section 25 of Title 17, U. S. C. A.

Thereafter, in November 1938, and January and February, 1939, E. J. Powell the publisher reproduced for profit more than five thousand copies of certain parts of the petitioner's work in direct violation of the notice of infringement served upon him in October, 1933.

The petitioner was refused permission to write to the publisher and make claim upon him for damages; he was refused permission to write to an attorney; he was refused permission to complain to the United States Attorney. When he complained to James V. Bennett he was advised to forget his claim. When he continued to protest, Mr. Bennett promised to investigate the matter. One year later, Mr. Bennett stated that he had been too busy to look into it, when the petitioner demanded:

"What are you waiting for, the Statute of Limitation to expire or for me to die?"Mr. Bennett replied: "You know, that is an idea."

Mr. Isiac Sway, Senior Warden's Assistant at Leavenworth said: "We admit that legally you have a valid claim ,but you are a convict and Mr. Powell is a respectable citizen. We cannot permit you to proceed against him for that would cause adverse publicity."

The petitioner submits that any regulation which permits prison authorities to so ruthlessly brush aside the property rights of prison inmates is repugnant to the due process clause of the Fifth Amendment.

It was in the hope of driving a wedge in the door that would permit himself and other prison inmates to seek the protection of the courts in such cases that this action was brought. That is the flood of litigation that the United States Court of Appeals for the Ninth Circuit is so anxious to prevent when it says:

". . . practical considerations militate against granting the appellant the relief for which he prays for to do so would open the door to a flood of applications from other prisoners which would seriously hamper the administration of our prison system."

And the petitioner might add, by exposing its abuses of power and causing adverse publicity.

The petitioner respectfully submits that it might be in the public interest for this court to define the property rights of Federal Prisoners, since it has never done so. Such definition might possibly remove much of the cause for the flood of litigation the court below seems to fear.

V

THAT EVEN AN INMATE OF ALCATRAZ HAS A RIGHT TO PROSECUTE A CIVIL ACTION IN PROPRIA PERSONA IN EVENT OF A SHOWING, THAT:

The inmate is capable of presenting his case in a proper manner;

That he can be produced in court without undue inconvenience or danger of escape;

That he has no attorney or is incapable or obtaining the services of one in whom he has confidence; and that the case involves a fundamental right.

This court has laid down the above conditions as criteria for determining whether or not an inmate of Alcatraz should be allowed to argue his case in propria persona before the circuit court of appeals.

Price v. *Johnston,* 334 U.S. 266

The right to property is a fundamental right as has been previously shown (Argument I), and it is obviously much more important to the litigant to have his case properly and satisfactorily presented to the district court in the first instance than it is to have it properly argued upon appeal, for if the case is bungled in the district court, even though he has a just cause, the best argument in the world cannot correct that bungling in a court of review.

On the other hand the motion filed in the district court (R. 20) pointed out that the petitioner has had rather unfortunate results with his attorneys. On several occasions he has consulted attorneys of San Franchisco and had them tell him that he had a good case but that they did not care to handle it for fear of offending government officials. One attorney said:

"I have to live with these people and provide for my family. I know that you have had a raw deal and I would like to help you, but I cannot afford to take your case."

The motion filed in the district court referred to some of the petitioner's experience with attorney Jacques Leslie. In this respect, petitioner refers the court to paragraphs 47 to 59, Appndix A and Appendix D, which consists of true copies of two letters received from Mr. Leslie. It will be noted that even though Judge Lemmon dismissed the action in case No. 28295-H, on December 7, 1948 (Appendix C) Mr. Leslie's first letter is dated February 25 1949, and that his second letter is dated July 5, 1949. The copy of the new petition was no better drawn than the petitions filed by the petitioner in that case. It failed to correct the jurisdictional statement to conform with the

requirements of the 1948 edition of Title 28, U. S. C. and it might have been drawn by any amateur law clerk from the origin paper within one hour. Not one statute or authority had been consulted. The next word the petitioner had from Attorney Leslie was in January, 1951. Exhibit A. (R. 29-48) was written in response to that letter, sent to petitioner's agent in an attempt to induce said agent to renew a contract with Mr. Leslie's client, Richard Palimar. Maybe if Judge Pope, who in his concurring opinion (R 61), designates this letter defamatory, scurrilous and abusive, could be in possession of all the facts or could have the pleasure of enjoying such an experience himself, he might feel that letter is very mild.

Be that as it may, if he had enjoyed the experience of seeing others profit to the tune of hundreds of thousands of dollars as a result of his labors while he languished in a solitary cell and had his tongue swell up and burst and his kidneys stop functioning from pellagra because the food served to him was insufficient to sustain health and unfit for a hog to eat, he might not think that any effort that he might make to improve his lot was *nonsense* (R. 61).

It is just possible that if Judge Pope were willing to spend a little time purging his profession of men like Mr. Leslie who are willing to use their professional skill to victimize a helpless man in prison, such letters would not be necessary.

In the present case the petitioner was represented in the circuit court by Nathan Cohn of San Francisco, who was appointed by Chief Judge William Denman to argue the case for the petitioner, (R. 56), after that court had denied the petitioner's motion for his personal appearance (R. 55)

At the time of the appointment, petitioner had already mailed his handwritten brief to the clerk and informed the clerk that he would arrange for paying the bill for printing by the regular court printer under the clerk's supervision as soon as he received an estimate of the cost.

Said brief was turned over to Attorney Nathan Cohn, and Mr. Cohn attempted to visit the petitioner, but at that time petitioners tongue had burst from pallagra, his kidney had stopped functioning and he was bed-ridden and unable to speak, so Mr. Cohn was not permitted to see him.

Two weeks later, while petitioner was still very ill, Attorney Cohn called at Alcatraz, spent more than one hour in discussion with P. J. Madigan, Associate Warden, then told the petitioner in his first breath that he wanted to withdraw the suit and make a settlement with the respondent.

Mr. Cohn had had petitioner's brief typed, but said that he wanted to change it and add a few more cases before sending it to the printer. For more than one month nothing was done and Mr. Cohn had failed to seek an enlargment of the time. On September 28, 1950, the clerk of the circuit court notified petitioner that he was in default on serving and filing his brief.

Thereupon, petitioner notified Paul P. O'Brien, Clerk of the Ninth Circuit Court of his illness and of the fact that his brief and the money to pay for the printing and serving had been in his hands since August 16, 1950, and disclaimed responsibility for the failure of an attorney, appointed without a request from him, to obey the rules. Mr. O'Brien arranged for the continuance and the brief was printed with change by Attorney Cohn.

A letter from Mr. Cohn is set out in Appendix E. It should be noted in the fourth to last paragraph Mr. Cohn states that he is not interested in cases which might cause embarrassment to the Warden. (Appendix E)

It is not intended to cast any reflection upon Mr. Cohn as an attorney, but only to show this court that the public has been so propagandized concerning the inmates of this place that it is impossible for such an inmate to obtain faithful legal service, no matter how just his cause.

NOTE: In regard to the use of objectionable language in prisoner's correspondence, the rules of Alcatraz provides that objectionable passages shall be marked and that the letter shall be returned to the writer so that he may reword such passages. The petitioner's communications were held up because of the business matters mentioned, not because of objectionable language, it will be noted (R. 9, Paragraphs X and XI) that the petitioner's letter, objectionable language and all, was mailed to the faithless attorney he was discharging, but not to his business agent, which caused petitioner and his business agent a heavy financial loss.

CONCLUSION

The writ of Certiorari should be granted, and this court should determine the rights of the parties. It should also define the rights and limitations of Federal prisoners with respect to property in general, so that the lower courts, prison officials and the prison inmates themselves may have a sound idea of just what these rights are.

Respectfully submitted by

ROBERT STROUD No. 594,
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In propria persona.